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VIA E-MAIL (WWW.REGULATIONS.GOV)

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0550

Re: *Advanced Notice of Proposed Rulemaking of Implementing Proposed Rule for Section 504 of the Rehabilitation Act for Federally Assisted and HUD Conducted Programs and Activities*
Agency/Docket Number: FR-6257-A-01
Documentation Citation: 88 FR 24938

Dear Office of General Counsel:

On behalf of our clients, the National Apartment Association ("NAA"), the National Leased Housing Association ("NLHA"), the Council for Affordable and Rural Housing ("CARH"), and the National Multifamily Housing Council ("NMHC") (jointly the "Housing Associations"), and their tens of thousands of members – owners, managers, developers, and investors in the nation's multifamily housing industry, we submit these comments in response to the Advanced Notice of Proposed Rulemaking of Implementing Proposed Rule for Section 504 of the Rehabilitation Act ("Section 504" or the "Act") For Federally Assisted and HUD Conducted Programs and Activities ("ANPR").

The nation's housing providers represented here NMHC are dedicated to preserving and growing affordable housing opportunities for all communities in this country. This includes supporting equal housing opportunities for persons with disabilities who are in need of affordable housing. Indeed, the availability of affordable rental housing is crucial to the mission of these organizations and their members. The Housing Associations fully support the efforts of the Department of Housing and Urban Development ("HUD") in updating its regulations implementing Section 504 to address limitations that have created uncertainty and confusion among the affordable housing industry and led to lost housing opportunities for persons with disabilities.

BACKGROUND

The ANPR seeks comments on a variety of issues that may impact HUD's Section 504 regulatory rulemaking. The Housing Associations NMHC jointly offer comments on those issues raised in the ANPR for which they are best suited to assist HUD in understanding the challenges Recipients face in meeting the Section 504 obligations and identify regulatory changes that should be made to address those challenges. With that in mind, we offer a brief background on the areas of the regulations for which comments are offered.

A. HUD's Existing Section 504 Regulations

Section 504 provides, that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a). While Section 504 defines the term "program or activity" in the Act, it does not expressly define the term "Federal financial assistance." The Act also places limits on structural alterations "small providers" must make to assure "program accessibility" by making clear that "small providers" are not required to make "significant structural alterations to their existing facilities, if alternative means of providing the services are available." 29 U.S.C. § 794(c). Finally, Section 504 provides that standards for enforcement used to determine if the Act has been violated in a complaint alleging employment discrimination are the standards applied under Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 *et seq.* 29 U.S.C. § 794(d). The Act provides no direction as to what standards apply in enforcing a complaint alleging housing discrimination under Section 504.

1. HUD's Existing Accessibility Regulations

HUD's existing Section 504 regulations impose accessibility requirements for "new construction" and "substantial alteration" of a "multifamily housing project." 24 C.F.R. §§ 8.22. 8.23(a). As of July 11, 1988, the architectural standard with which Recipients of Federal financial assistance must comply to meet these requirements is sections 3-8 of the Uniform Federal Accessibility Standards ("UFAS"). 24 C.F.R. § 8.32(a). HUD's existing regulations also impose accessibility requirements on alterations to existing "multifamily housing projects" that do not rise to the level of "substantial alteration." 24 C.F.R. § 8.23(b). The regulations require such alterations "to the maximum extent feasible, be made readily accessible to and usable by individuals with [disabilities]."[1] *Id.*

[1] We use the term individuals with a "disability" that we understand is the preferred description for individuals protected by Section 504, rather than the antiquated term "handicap." The Housing Associations recommend that HUD replace the term "handicap" with "disability" in any new regulations adopted pursuant to this rulemaking.

However, the regulations do not cite a specific architectural standard Recipients must use to meet this obligation. HUD indicated in the ANPR that it intends to propose the adoption of an updated Federal accessibility standard for purposes of compliance with HUD's Section 504 regulations.

2. HUD's Existing Reasonable Accommodation Regulations

HUD's existing regulations require Recipients of Federal financial assistance to "modify housing policies and practices to ensure that these policies and practices do not discriminate, on the basis of [disability], against a qualified individual with [disabilities]." 24 C.F.R. § 8.33. The regulations also require that a Recipient "shall operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with [disabilities]." 24 C.F.R. § 8.24(a).[2] However, the Recipient need not make modifications or accommodations if the modifications or accommodations "[w]ould result in a fundamental alteration in the nature of the program or activity or undue financial and administrative burdens." 24 C.F.R. § 8.24(a)(2)/24 C.F.R. § 8.33. HUD indicated in the ANPR that it intends to propose revisions to HUD's existing Section 504 regulations regarding the reasonable accommodation obligations of Recipients of Federal financial assistance. The ANPR specifically requests comment regarding "reasonable accommodation."

3. HUD's Existing Administrative Investigation and Enforcement Regulations

Finally, HUD's regulations address its administrative enforcement authority for investigating individual Section 504 complaints, complaints on behalf of a class of individuals who allege they have been subjected to discrimination under Act, and compliance reviews of a Recipients. 24 C.F.R. §§ 8.50–8.58. The ANPR requests comment on clarifications or changes HUD should consider in procedures for initiating and conducting investigations and enforcement proceedings against Recipients.

COMMENTS

The Housing Associations offer the following comments in response to the questions presented in the ANPR for which its members can offer specific insight and assistance to HUD.

2. *Question for Comment 4(b) – Is there information that HUD should consider to clarify, strengthen, and encourage compliance by Recipients' [sic] with program obligations?*

[2] These obligations are commonly referred to as "reasonable accommodation."

a. HUD should clearly define programs that are considered Federal financial assistance for purposes of Section 504.

HUD should amend its regulations to provide clear direction as to what programs it considers covered by Section 504. HUD's existing regulations define "Federal financial assistance" as follows:

> *Federal financial assistance* means any assistance provided or otherwise made available by the Department through any grant, loan, contract or any other arrangement, in the form of:
>
> (a) Funds;
>
> (b) Services of Federal personnel; or
>
> (c) Real or personal property or any interest in or use of such property, including:
>
> (1) Transfers or leases of the property for less than fair market value or for reduced consideration; and
>
> (2) Proceeds from a subsequent transfer or lease of the property if the Federal share of its fair market value is not returned to the Federal Government.
>
> *Federal financial assistance* includes community development funds in the form of proceeds from loans guaranteed under section 108 of the Housing and Community Development Act of 1974, as amended, but does not include assistance made available through direct Federal procurement contracts or payments made under these contracts or any other contract of insurance or guaranty.

24 C.F.R. § 8.3.

Recipients oftentimes receive conflicting information from various HUD personnel regarding whether participating in a particular HUD program makes them a "Recipient of Federal financial assistance."[3] For example, borrowers under HUD's 223(f) and 221(d)(4) programs that provide loans for which lenders are insured against loss on mortgage defaults often receive conflicting information regarding the applicability of Section 504 to projects receiving such loans. While it appears clear from this example that a borrower for a housing project that is financed through a HUD 223(f) or 221(d)(4) loan is not a

[3] HUD has referred to some programs it believes are subject to Section 504 requirements, but the references come in different forms and always refuse to include an exhaustive list of programs. *See e.g., HUD Multifamily Accelerated Processing (MAP) Guide* at A.5.2.4(A)(1) (Rev. March 19, 2021) ("A few but not exhaustive examples of Assisted Housing subject to Section 504 requirements relevant to FHA include . . .") (emphasis added).

Recipient of Federal financial assistance, HUD personnel have provided conflicting responses as to whether Section 504 is applicable. In revising the existing regulations, HUD can remedy this issue and provide clear guidance as to which programs HUD believes constitute Federal financial assistance for purposes of Section 504 coverage. In the alternative, HUD should revise its regulations to mandate that HUD must periodically (e.g. on an annual basis) publish a list of programs it believes constitute Federal financial assistance for purposes of Section 504 coverage. Such a regulation will ensure that borrowers clearly understand if Section 504 imposes obligations on the design, construction, alteration, and/or operation of a housing project.

b. HUD should provide guidance on the meaning of "maximum extent feasible" with regard to "alterations."

HUD should amend its regulations to provide clear standards to use in determining if proposed "alterations" exceed the "to the maximum extent feasible" standard. In some circumstances residential developments that existed prior to the effective date of HUD's regulations were constructed in a manner that make complying with any architectural accessibility standard practically impossible. Take, for example, an existing townhome development in which the units have living space inside the individual unit on more than one level and all of the bedrooms are on floors above the ground floor. In that instance, making the unit accessible to and usable by individuals with disabilities is practically impossible because there is insufficient space within the existing structure to add a bedroom on the ground floor and doing so would require, if even technically possible, the installation of an elevator to the floors about the ground floor.[4] To make these units readily accessible and usable would require constructing new units which is clearly beyond making "alterations" to existing facilities and not required by the Act. Under HUD's existing regulations, it remains impossible to definitely determine if the proposed alterations go beyond "the maximum extent feasible" standard.

There is direction available to HUD regarding how it can provide guidance on alterations that go beyond the "maximum extent feasible." The Department of Justice ("DOJ") has adopted regulations implementing Title II of the ADA[5] that explain an alteration to a path of travel to a public entity goes beyond "the maximum extent feasible" if the cost and scope of the alteration "is disproportionate to the cost of the overall alteration." The regulations explain that "[a]lterations made to provide an accessible path

[4] Section 8.26 provides that the requirement that accessible units are distributed throughout the project site in a sufficient range of sizes and amenities shall not be construed to require the provision of an elevator "solely for the purpose of permitting location of accessible units above or below the accessible grade level." This section does not appear to expressly exclude the installation of an elevator for purposes of meeting the "alteration" requirements of the regulations.

[5] HUD often cites to Title II as having similar obligations as Section 504. For example, the ANPR states that it anticipates revising the definition of "individual with a disability" consistent with Title II and the term "programs and activities" is intended to cover the same type of operations that are covered by Title II of the ADA.

of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area." 28 CFR § 35.151(b)(4)(iii). The ADA regulations finally explain the costs that can be included to calculate if the cost is disproportional and the duty to make some alterations without incurring disproportionate costs. These regulations provide a good road map for HUD in that Title II was modeled after Section 504. Adopting such a cost threshold would provide clear direction to Recipients in determining what is "feasible" in making alterations.

This change will ensure Recipients understand the extent to which existing multifamily housing projects must be made accessible when undergoing "alterations." What is more, it will also ensure reasonable alterations are made to increase accessibility in existing projects that may fall short of full accessibility but provide housing opportunities for some persons with disabilities by ensuring alterations that are not disproportionately costly are made.

c. <u>HUD should define "small provider" and "significant structural alterations."</u>

As discussed above, the Act places limits on structural alterations "small providers" must make to assure "program accessibility" by making clear that "small providers" are not required to make "significant structural alterations to their existing facilities, if alternative means of providing the services are available." 29 U.S.C. § 794(c). However, HUD's existing regulations do not define who is considered a "small provider" nor what constitutes a "significant structural alteration." As this is a specific charge of the Act, HUD should define these terms and explain how a "small provider" complies with the Act as a Recipient of HUD Federal financial assistance.

3. *Question for Comment 6 – What standards should the Department consider for purposes of an updated accessibility standard for its Recipients?*

As discussed in the ANPR, most Recipients of Federal financial assistance are subject to more than one federal and state accessibility law, building code and technical architectural accessibility standard. While property owners and builders rely on specialized expertise to meet their compliance obligations, design professionals and housing providers who have absolutely no intention of excluding persons with disabilities from housing nevertheless sometimes face allegations of noncompliance. Indeed, affordable housing subject to Section 504 is often subject to multiple levels of review by lenders, state housing finance agencies, and others to determine compliance with federal accessibility requirements. Despite "approval" by these organizations, Recipients still contend with questions of compliance with accessibility requirements.

With that said, one architectural accessibility standard cannot be used for compliance with all of the applicable accessibility laws. Each law was passed by Congress to serve a particular purpose with varying levels of accessibility provided under each law. For example, the Fair Housing Act ("FHA") "design and construction" requirements do not apply to the alteration of housing that existed before March 13, 1991,

and the accessibility required in FHA "covered dwellings" are different "adaptive design" requirements as reflected in the FHA Accessibility Guidelines and "safe harbors" as compared with the accessibility standard imposed by Section 504 by the Uniform Federal Accessibility Standard ("UFAS").

Therefore, HUD should recognize the role and purposes of various accessibility standards and carefully consider various compliance options through rulemaking. We further encourage HUD to explore the benefits and challenges posed by various approaches. For example, a "safe harbor" approach is used under the FHA. HUD has started down that road by issuing a deeming notice on May 23, 2014, that allows the use of the 2010 ADA Standards for Accessible Design ("ADAAG"), with certain exceptions, as an alternative to UFAS. *See* HUD's Alternative Accessibility Standard set forth in HUD's notice at 79 Fed. Reg. 29,671 (May 23, 2014). While substantially equivalent to UFAS, there were portions of the 2010 ADAAG that HUD recognized may not be equivalent. What is more, Recipients have found elements in residential construction that 2010 ADAAG does not address likely because the standard was developed primarily for commercial construction. For example, 2010 ADAAG does not address issues that may arise as to the accessibility of a sliding glass door often used in residential construction but rarely used in commercial construction.

As HUD reviews Section 504 compliance standards, we urge you to recognize the importance of consensus-based codes and standards developed by national code and standards developers and consider standards that provide robust and practical compliance pathways, while maximizing flexibility and cost-effectiveness. This will ensure compliance with the accessibility mandate of Section 504 and result in more accessible affordable housing for persons with disabilities.

4. *Question for Comment 10 – Are there any comments HUD should consider when further addressing the concept of what constitutes a reasonable accommodation in its Section 504 regulations?*

a. <u>HUD should provide additional regulatory guidance on the definition of "disability" and the ability and scope of a Recipient's authority to verify the nature of an individual's disability and the disability-related need for the requested accommodation</u>

The Act and HUD's existing Section 504 regulations apply to "qualified individuals with a [disability]." 29 U.S.C. § 794; 24 C.F.R. §§ 8.20–8.33. HUD's regulations define an "individual with [disabilities]" as "any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment." 24 C.F.R. § 8.3. The regulations exclude from this definition persons whose current use of alcohol or drugs prevents them from participating in the program or activity in question or who constitutes a direct threat to the health and safety of others or property. *Id.* Of course, an individual who has such a disability is only covered by Section 504 if they are otherwise qualified

for the program or activity operated by the Recipient that is receiving Federal financial assistance. This includes, for example, an individual who is able to meet the eligibility requirements of the housing program "such as income as well as other explicit or implicit requirements inherent in the nature of the program or activity, such as requirements that an occupant of multifamily housing be capable of meeting the Recipient's selection criteria and be capable of complying with all obligations of occupancy with or without supportive services provided by persons other than the Recipient." *Id.*

HUD states in the ANPR that it anticipates revising the definition of "individual with a disability" consistent with the change of the definition of that term under Title II of the ADA and asks for comment on updating that definition. We note that under Title II of the ADA a public entity has not obligation to provide a reasonable accommodation to a person who falls solely under the "regarded as" definition of disability. *See* 28 C.F.R. § 35.130(b)(7)(ii). Therefore, HUD should explain in its revised regulations that a person who falls solely under the "regarded as" definition of disability under Section 504 is not entitled to a reasonable accommodation or modification.

Additionally, when a resident requests a reasonable accommodation, the Recipient must determine if the resident is an "individual with a disability" and whether they have a disability-related need for the requested accommodation. Indeed, if the individual does not meet the definition of "disability" and/or their requested accommodation is not necessary because of a disability, the Recipient has no obligation to grant the requested accommodation. For that reason, understanding the scope of a Recipient's authority to verify the information a resident is providing is crucial to complying with Section 504. HUD's current Section 504 regulations do not provide sufficient guidance on the nature and scope of this authority.

HUD has provided "guidance" on "reasonable accommodation" in its Joint Statement with the DOJ on *Reasonable Accommodations under the Fair Housing Act* noting, "the principles discussed in this Statement regarding reasonable accommodation under the Fair Housing Act generally apply to requests for reasonable accommodations to rules, policies, practices, and services under Section 504." Department of Justice and HUD, Joint Statement on Reasonable Accommodations at 2, nt. 4 (May 17, 2004).[6] However, this guidance is not regulatory in nature and was published without public comment and input. HUD should incorporate the principles from the Joint Statement into its Section 504 regulations, after making changes deemed necessary after public comment, to provide clear guidance on the scope of authority a Recipient has to verify that a resident requesting an accommodation or physical modification has a "disability" and disability-related need for the accommodation or modification.

[6] The Joint Statement also does not address a Recipient's obligation to make reasonable physical modifications under Section 504 which is fundamentally different the FHA "reasonable modification" provision found at 42 U.S.C. § 3604(f)(3)(A). *See* Section 4.b., *supra.*

b. HUD should provide guidance on the meaning of "undue financial burden" with respect to structural modifications.

HUD should amend its regulations to provide guidance on the definition of "undue burden" with respect to structural modifications to housing. Specifically, while the Section 504 regulations provide factors used to determine if a reasonable accommodation poses an "undue burden" in the context of employment (see 24 C.F.R. § 8.11), the regulations provide no such list of factors—let alone parameters on those factors—that will be used to determine whether a structural modification in housing poses an "undue burden." Rather, with respect to such an undue burden in housing, the regulations state only as follows:

> (a) General. A Recipient shall operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—
>
> > (1) Necessarily require a Recipient to make each of its existing facilities accessible to and usable by individuals with handicaps;
> >
> > (2) Require a Recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or activity or in **undue financial and administrative burdens.** If an action would result in such an alteration or such burdens, the Recipient shall take any action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

24 C.F.R. § 8.24 (emphasis added). Notably HUD Handbook 4350.3 (Occupancy Requirements of Subsidized Multifamily Housing Programs) (the "Handbook"), provides a list of factors that will be considered in determining an "undue financial burden"; however, the Handbook is similarly silent on the parameters of these factors. The Handbook states:

> B. Undue Financial and Administrative Burden. The determination of undue financial and administrative burden must be made on a case-by-case basis, involving ***various factors, such as the cost of the reasonable accommodation, the financial resources of the provider, the benefits the accommodation would provide to the requester, and the availability of alternative accommodations that would adequately meet the requester's disability related needs.*** For examples of undue financial and administrative burden, see Exhibit 2-6.

> C. ***Owners are not required to make structural changes that would impose an undue financial and administrative burden***, even if alternatives to making housing programs or activities readily accessible to and usable by persons with disabilities are not effective.

See Handbook at 2-40 (emphasis added).

HUD has provided "guidance" on "reasonable modification" under the FHA in its Joint Statement with the DOJ on *Reasonable Accommodations under the Fair Housing*. Department of Justice and HUD, Joint Statement on Reasonable Modifications (March 5, 2008). However, this guidance is limited to a housing provider's obligation to "allow reasonable modification" pursuant to the FHA, 42 U.S.C. § 3604(f)(3)(A). Section 504's requirement that a Recipient make reasonable structural modifications necessary for a resident with a disability is a completely different obligation than under the FHA, which requires housing providers to allow reasonable modifications paid for by residents with disabilities. The heightened obligation for Recipients of Federal financial assistance to pay for structural modifications fundamentally changes how Recipients determine if the requested modification is reasonable, so the Joint Statement provides no guidance for Recipients in complying with Section 504 reasonable modification obligation.

As it stands, housing providers have little regulatory direction on when a structural modification poses an "undue financial and administrative burden." While it appears from the Handbook that HUD does consider certain factors (*e.g.*, the cost of the reasonable accommodation, the financial resources of the provider, the benefits the accommodation would provide to the requester, and the availability of alternative accommodations that would adequately meet the requester's disability related needs), these factors appear nowhere in the existing Section 504 regulations. Moreover, even were similar factors included in the regulations, the regulations should provide further definition of the factors such as "financial resources of the provider" and use of residual receipts or replacement reserve funds as discussed below.

b. HUD should clarify which entities are included in the determination "financial resources of the provider."

The financial resources of the Recipient are included in any determination if a proposed structural medication imposes an "undue financial and administrative burden." While the financial resources of the Recipient should undoubtedly be included in that determination, housing providers have historically been given differing opinions from HUD on the scope of entities to include in this determination. Therefore, HUD should clarify in its regulations that only the financial resources of the Recipient of the Federal financial assistance should be used to determine if an accommodation or modification imposes an undue financial and administrative burden, not non-Recipients who were retained by the

Recipient to provide services to the property. For example, a property management company retained by the Recipient to manage the property but that was neither the Recipient of the Federal financial assistance nor otherwise owned or controlled by the Recipient should not be included in the determination.

c. HUD should clarify to what extent housing providers are obligated to utilize residual receipts or replacement reserve funds to pay for the cost of reasonable structural modifications.

The Handbook also suggests that, prior to deeming a modification to be an "undue financial burden," a housing provider should request to use its residual receipts or replacement reserve account to pay for the cost of a structural modification. *See* Handbook at 2-40. Despite HUD making this suggestion in the Handbook, the Section 504 regulations have implemented no such requirement. HUD should revise its regulations to clarify the obligation to utilize a residual receipts or a replacement reserve account to make reasonable structural modifications. Furthermore, it should define any limits on the use of such funds for modifications.

What is more, the Handbook appears to describe when the use of residual receipts or replacement reserve funds would impose an undue financial and administrative burden. The Handbook includes the following example:

> Example – Reasonable Accommodation that Creates an Undue Financial and Administrative Burden
>
> Project A is a 100-unit HUD assisted project. A resident in this project needs more than $5,000 in structural changes for his unit to be accessible to him. The owner of Project A could not cover the costs of such extensive structural changes without a rent increase. Residual receipts are insufficient to cover the changes, and the replacement reserve cannot be replenished within one year. The project does not have sufficient administrative staff to explore numerous possibilities for obtaining funding for such structural changes. Generally an owner would not be required to make such extensive structural changes because of the burden involved. Note that the amount an owner is required to spend to make units accessible could vary based on the size of the project – what the owner of a large project may be able to spend in making units accessible may be an undue burden on smaller projects.

Id. This conveys HUD's position that if: (1) the residual receipts are insufficient to cover the costs of the structural modification without raising rent; (2) the amount taken from the replacement reserve for the structural modification cannot be replenished within one year at the current rental rate without raising rent; and (3) the project does not have sufficient

staff to explore the possibilities for obtaining funding from another source, then the requested modification poses an undue financial and administrative burden. While helpful, it still fails to provide a sufficient level of description as to what HUD defines as "sufficient administrative staff to explore" other funding possibilities.

Requests for structural modifications to accommodate a resident's disability are common and while the Handbook provides this example, it is neither regulatory nor sufficient to guide Recipients. HUD should address this through the proposed rulemaking by clarifying that a proposed structural modification imposes an undue financial and administrative burden if: (1) the residual receipts are insufficient to cover the costs of the structural modification; (2) the amount taken from the replacement reserve for the structural modification cannot be replenished within one year at the current rental rate without raising rent; and (3) the project does not have sufficient administrative staff to explore the possibilities for obtaining funding from another source (albeit with more description of how to define insufficient administrative staff).

Another common question that arises when a resident requests a structural modification is if moving the resident to another unit in the same residential development that already fully complies with UFAS and otherwise meets the resident's disability-related needs is an equally-effective accommodation. This alternative appears reasonable given HUD's current regulations state that the accommodation requirement does not "[n]ecessarily require a Recipient to make each of its existing facilities accessible to and usable by individuals with handicaps." HUD should clarify through this rulemaking process that Recipients have the option of relocating the resident requesting the reasonable modification to another unit within the development that is already compliant with UFAS (or any new standard adopted by HUD) and that otherwise meets the resident's disability-related needs rather than making structural modifications to an existing unit.

These are just two examples of common requests for structural modifications Recipients receive and should not be viewed as a limitation on how the regulations can provide more guidance on this issue. However, explaining in more detail the specific factors that should be taken into account and providing these examples will help Recipients understand both when HUD will deem that a proposed modification imposes an undue financial and administrative burden to the housing provider and when HUD will expect a housing provider to make a modification without questioning the financial cost of the modification. Including such details in the regulations will ensure that housing providers understand what financial resources are available to them, as well as when the cost of a structural modification should not be used as a reason to deny a modification—ensuring fewer barriers for individuals with disabilities.

5. ***Question for Comment 11 – Are there any clarifications or changes HUD should consider in procedures for initiating and conducting investigations***

and/or enforcement mechanisms with respect to individual complaints or compliance reviews?

Any regulations adopted through the rulemaking process should provide more direction as to what standards apply in enforcing a complaint alleging housing discrimination or conducting a compliance review under Section 504. Notably, Section 504 provides that standards for enforcement used to determine if the Act has been violated in a complaint alleging employment discrimination are the standards applied under Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 *et seq.* *See* 29 U.S.C. § 794(d). However, the Act provides no direction as to what standards apply in determining whether a housing provider has violated Section 504.

HUD's current regulations themselves are similarly vague. Indeed, with respect to compliance reviews, the regulations only state as follows:

> Each Recipient shall keep such records and submit to the responsible civil rights official or his or her designee timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the responsible civil rights official or his or her designee **may determine to be necessary** to enable him or her to ascertain whether the Recipient has complied or is complying with this part. **In general**, Recipients should have available for the Department data showing the extent to which individuals with handicaps are beneficiaries of federally assisted programs.

See 24 C.F.R. § 8.55 (emphasis added). The above language does not provide sufficient detail to allow a housing provider to prepare for or successfully "pass" a compliance review. Indeed, it does not provide any level of detail regarding the information a housing provider should consistently maintain for purposes of a compliance review. HUD should amend its regulations to provide clarity around these issues.

Similarly, the regulations provide only a vague explanation as to when a "compliance review" may be conducted, indicating as follows:

> The responsible civil rights official or designee may periodically review the practices of Recipients to determine whether they are complying with this part and where he or she has a reasonable basis to do so may conduct on-site reviews. Such basis **may** include **any evidence that a problem exists or that programmatic matters exist** that justify on-site investigation in **selected circumstances**.

See 24 C.F.R. § 8.56 (emphasis added). Moreover, with respect to investigations, the regulations also lack detail, stating only, "The responsible civil rights official shall make a prompt investigation whenever a compliance review, report, complaint or any other

information **indicates a possible failure to comply with this part**." *See* 24 C.F.R. § 8.56(b) (emphasis added).

Perhaps a bigger concern for Recipients is HUD's conduct after it has issued a "Preliminary Letter of Findings." While HUD reaches this conclusion without providing the Recipient the due process the Recipient should be afforded in this context and styles it as a "preliminary finding," the LOF often includes a notice stating, "the Recipient may be ineligible for discretionary funding under any HUD Notice of Funding Availability until this matter is resolved to the Department's satisfaction" without a supporting citation. Even were there regulatory support for withholding discretionary funding at this stage, such a threat (and certainly withholding such funds at this stage) deprives the Recipient of due process and is a tool that appears to be used to compel the Recipient to agree to draconian remedies through a "Voluntary Compliance Agreement" for administrative expediency. Indeed, the Recipient has not afforded the Recipient the opportunity to have a third-party administrative law judge through a debarment proceeding pursuant to 24 C.F.R. § 8.57(a)(2) or, if HUD refers the matter to the DOJ pursuant to 24 C.F.R. § 8.57(a)(1), a court of law, hear the matter and determine if HUD's belief that the Recipient has violated Section 504 is valid, which are foundational principles of due process.

The regulations should include more detail regarding what compliance information a housing provider should maintain as a matter of course, as well as what standards will be used during a compliance review or investigation. Finally, the regulations should afford Recipients due process in determining if Recipients have actually violated Section 504 before threatening or withholding HUD funding. Failing to provide a housing provider with such guidance and protections will prevent a housing provider from successfully meeting HUD's expectations.

General Comment

Vital to preserving and increasing accessibility in housing under programs receiving Federal financial assistance from HUD is the need for additional funding. Whether facing altering an existing property that was designed and constructed prior to July 11, 1988 or incorporating additional or expanded architectural technical standards that HUD may adopt through this proposed rulemaking process, the cost of designing and constructing affordable housing with accessibility features continues to rise. Section 504 includes a "full accessibility" requirement and the requirement that Recipients must pay for reasonable modifications to existing housing. This results in a higher cost to make affordable housing accessible and usable by persons with disabilities and, consequently, impacts the overall number of affordable housing units that are available under any HUD program requiring Section 504 compliance. Therefore, HUD must consider increasing funding and technical assistance for affordable housing programs to ensure accessibility, particularly if HUD intends to impose additional or expand existing technical accessibility requirements.

HUD should consider, among other things, making funding available for housing providers to use specifically for accessible features included in covered and non-covered residential units. The funding should be available for new construction and alteration, and it should be directed toward instances where a reasonable accommodation calls for retrofits that impose an undue and financial and administration burden but could be accomplished with additional funding provided through the HUD program. This additional funding will ensure greater accessibility for persons with disabilities in affordable housing while reducing the potential reduction in the overall number of affordable housing units.

Very truly yours,

Scott P. Moore
Sara A. McCue
FOR THE FIRM

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